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Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

KLOSTER CRUISE LINES N.V.
d/b/a NORWEGIAN CRUISE LINE,
Petitioner,
v.

PATRICIA ESPINET, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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36 pgs

QUESTION PRESENTED FOR REVIEW

Whether public policy interests permit the State of Florida to apply a consumer protection law, the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), Fla. Stat. Ch. 501.201-213 (1991) to a maritime contract, a passenger cruise ticket, when the imposition of the state law works material prejudice to the characteristic features of general maritime law.

CASE NO.: SC00-1463
COURT OF APPEALS NO.: 99-852 (consolidated case)
TRIAL COURT NO.: 96-18139

CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner certifies that the following persons and entities have or may have an interest in the outcome of this case.

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36. Honorable Stuart Simons, Circuit Court Judge
37. Jeffrey S. Udell, Esq., Defendant/Appellee
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CORPORATE DISCLOSURE STATEMENT

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British Isles

Arrasas Limited is the parent company and owns 100% of NCL Limited's shares.

JURISDICTIONAL STATEMENT

Jurisdiction is proper pursuant to 28 U.S.C. 1257. The underlying opinion rendered by the Florida Court of Appeal, Third District, was filed on July 29, 1999. The Florida Supreme Court denied Norwegian's petition for certiorari on April 19, 2002. The exercise of jurisdiction by state courts over cases encompassing issues of federal law is subject to the condition that state courts faithfully enforce the supreme law of the land in order to secure state compliance with and national uniformity of federal law. When a state court fails to comply with that condition, the state court's decision is subject to review by the Supreme Court. In this case the state court failed to comply with this condition when it rejected the premise that federal maritime law preempts an application of a state consumer statute to a maritime contract.

The state court decision is final on the federal issue and is not subject to further review in the state courts. Petitioner will be liable for damages if the elements of the state cause of action are proved. On the one hand, while Petitioner may prevail at trial on non-federal grounds, if Petitioner is correct in its view that the Florida state court erroneously concluded that that a state consumer statute may be applied to a maritime contract in a manner inconsistent with general maritime law, there should be no trial at all. Moreover, even if Petitioner prevailed at trial and made unnecessary further consideration of the federal question, there would remain in effect the unreviewed decision of the state court that a state consumer statute which conflicts materially with general maritime law can apply to a maritime contract.

Delaying final decision of this federal question will leave a significant gap in the uniformity of federal maritime law, mandated by the United States Constitution. *See Miles v. Apex*, 498 U.S. 19; 111 S. Ct. 317; 112 L. Ed. 2d 275;

1990 U.S. LEXIS 5688; (1990). *See also Kossick v. United Fruit Co.,* 365 U.S. 731, 6 L. Ed. 2d 56, 81 S. Ct. 886 (1961*); Muratore v. M/S Scotia Prince,* 656 F. Supp. 471 (D. Maine 1987*)* (states may apply state law to supplement maritime law if that application does not flatly contradict maritime law).

On the other hand, if this Court were to hold that federal maritime law preempts application of the state consumer statute, this litigation ends. Given these factors, the exercise of this court's jurisdiction is consistent with the pragmatic approach that this Court has followed in the past pursuant to 28 U.S.C. 1257. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485-876, 95 S. Ct. 1029, 43 L. Ed 2d 328 (1975).

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STATEMENT OF THE CASE AND FACTS

This petition for certiorari arises from the opinion of a Florida Court of Appeal which found that the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), Fla. Stat. Ch. 501.201-213 (1991) could be applied to a passenger cruise ticket because it did not work material prejudice to the characteristic features of general maritime law or interfere with its proper harmony and uniformity. *Latman v. Costa Cruise Lines*, 758 So. 2d 699 (Fla. 3rd DCA 2000). [App. 1; 5]. The *Latman* court determined that FDUTPA, which merely requires proof of "unfair or deceptive acts or practices in the conduct of any trade" could supplant the more stringent requirements of a federal maritime tort. Petitioner Kloster Cruise Lines, N.V. d/b/a Norwegian Cruise Line (Norwegian) maintains that adjudication under the Florida statute has no counterpart in federal admiralty law, that its application would deprive Norwegian of substantive admiralty rights to which it is entitled, and that it would upset uniformity in the application of maritime law, a principal goal of admiralty jurisdiction. Norwegian maintains that the decision has wide-ranging consequences potentially affecting approximately twenty-five million cruise line passengers.

In this consolidated case, the plaintiffs are cruise passengers who traveled on ships owned by Norwegian, Costa Cruise Lines, N.V. and Carnival Cruise Lines. During the relevant time period, Norwegian's passenger ticket price was itemized as follows: the total ticket price was the sum of the cruise fare price plus governmental fees and taxes, and port charges. The plaintiffs below contend that the term "port charges" necessarily informed the consumer that these were "pass-through" charges by the cruise line to the relevant port authorities. Although "the plaintiffs testified that they were willing to pay and did pay, the quoted fare (including "port charges") for the cruises

and were happy with the cruises" they nonetheless alleged that the cruise lines passed through only a portion of the port charges to port authorities, and kept the remainder for themselves as additional profit, and that this practice amounted to an unfair and deceptive trade practice for purposes of FDUTPA. [App.1]

The Plaintiffs initially filed a complaint in September 1995 in the United States District Court for the Southern District of Florida alleging RICO claims and pendant state law claims. *Fischlowitz v. Kloster Cruise Ltd.*, No. 95-2108-CIV-King (S.D. Fla.)[1] [App. 3] The gravamen of Plaintiffs' complaint was that Defendants, through their alleged deceptive sales and marketing materials, misrepresented the true nature—but not the amount—of the "port charges" collected from passengers. According to the plaintiffs, Defendants represented to potential passengers that port charges were payments which Defendants actually owe and pay to government authorities for their passengers' use of port facilities at scheduled ports of call when, in reality, the port charges represent hidden profits.

Judge James Lawrence King granted Norwegian's motion to dismiss plaintiffs' federal claim with prejudice on the ground that the court was "unable to discern the injury that resulted to Plaintiffs from Defendants' alleged misrepresentation." The court reasoned:

> The gravamen of Plaintiff's Second Amended Complaint is that "[a]s part of a uniform scheme to defraud its customer and to increase its profits, [Defendant] used false pretences and misrepresentations calculated to deceive persons of ordinary prudence by misrepresenting the amount of port charges

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[1] The named plaintiffs in the federal action, Arlene Fischlowitz and Patricia Fischlowitz, are also two of the named Plaintiffs in the state action.

> applicable to cruises taken on [Defendant's] vessels." (Compl. ¶ 15). They allege RICO liability due to Defendant's purported use of the United States mail to distribute "false advertising brochures, contracts, invoices, and ticket information." (Compl. ¶ 16). Plaintiffs conclude by alleging that they "have been injured by reason of [Defendant's] violations of [federal RICO statute]" (Compl. ¶ 19).... Here, Plaintiffs have failed to point to a misrepresentation by Defendant about which they knew, and on which they relied to their detriment in contracting with Defendant. Defendant represented that it would charge a certain amount for additional charges incident to travel on its ship, and then proceeded to charge that amount. Plaintiffs have not met the causal requirement to maintain a claim under RICO.... (citations omitted) [App. 3]

Following dismissal of the federal case, three different groups of Plaintiffs filed separate actions against Norwegian in the Florida state court below on behalf of themselves and all others similarly situated. The actions were consolidated for pre-trial matters. After dismissing Plaintiff's complaints and amended complaints on several occasions, the trial court denied Norwegian's motion to dismiss. As in the federal action, the Plaintiffs sought to recover the difference between the amount Defendants collected for port charges and the amount Defendants actually paid out to governmental authorities.

Deposition testimony of the class representative established that she did not rely on allegedly deceptive cruise brochures prior to purchase of her cruise ticket, and that the imposition of port charges had no effect on her decision to take the cruise. She also admitted that she was

not damaged by Norwegian because she received the benefit of her bargain.

The Plaintiffs moved for class certification of a national class consisting of approximately twenty-five million passengers who sailed on Defendants' cruise lines since 1992. The Defendants maintained as a threshold issue that FDUTPA could not be applied because it conflicted with federal maritime law. In the alternative, the defendants argued that as a basis for a class action FDUTPA was inappropriate because it required the Plaintiffs to demonstrate reliance and damages, which would entail a case-by-case determination.[2] They argued that absent some indication that the consumers were deceived in some way by the term "port charges," or the amount collected, there is neither reliance nor resulting damage under FDUTPA.

The trial court denied Plaintiffs' motion for class certification. [App.4]

The Plaintiffs appealed the trial court's denial of their motion for class certification. The Third District Court of Appeal reversed and certified the class. Recognizing that a passenger cruise ticket is a maritime contract, and that the Third District has held that state law must yield to the needs of a uniform federal maritime law when state law and federal maritime law conflict, the court nonetheless rejected the cruise lines' threshold argument that FDUTPA is completely displaced by maritime law and can have no application to a passenger cruise ticket because the legal standards in the state consumer law had no counterpart in federal admiralty law. The court found that FDUTPA was a permissible remedy where the cruise line bills the passenger for port charges but keeps part of the money for itself. "We are unable to see how the enforcement of state law against deceptive and unfair trade practices would work material prejudice to the characteristic features of the

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[2] Fla. R. Civ. P. 1.220 is patterned on Fed. R. Civ. P 23.

general maritime law, or interfere with its proper harmony and uniformity." *Latman v. Costa Cruise Lines*, 758 So. 2d 699 (Fla. 3d DCA 2000). [App. 1]

On March 2, 2000, Norwegian moved for rehearing, Certification, Clarification or Rehearing en Banc. The Third District denied the motion on May 31, 2000. The Florida Supreme Court denied certiorari on April 19, 2002. [App. 2] This petition follows.

ARGUMENT

In *Latman v. Carnival Cruise Lines*, the Third District Court of Appeal found that a legislatively-created remedy, a consumer protection statute, whose legal standards for recovery had no counterpart to those enunciated in federal maritime law, could displace federal law and apply to a claim governed by general maritime law. In so ruling, the Third District ignored the conflict between material provisions of substantive Florida law and federal admiralty law, upset the uniformity of federal maritime law, and improperly altered the rights and liabilities of the parties. *See Latman v. Carnival Cruise Lines*, 758 So. 2d 699 (Fla. 3d DCA 2000), rev. *denied*. 2002 Fla. Lexis 848 (April 19, 2002).

While *Latman* accepts the premise that a passenger ticket is a maritime contract, and that issues involving a cruise ship's ticket and the contract of passage are therefore governed by federal maritime law and not by state law, the state-court opinion fails to give more than a passing nod to restraints imposed on it by federal admiralty courts. It fails to provide *any* analysis of material conflicts between federal maritime law and certain provisions in FDUTPA. Indeed, not one of the cases cited by *Latman* for the proposition that the application of FDUTPA works no material prejudice to the characteristic features of maritime law addresses federal admiralty law and state consumer actions.

The proper analysis is entrenched in federal maritime law. Under the "savings to suitors" clause of the Judiciary Act of 1789, presently codified in the United States Code as Title 28 U.S.C. Sec. 1333, "a state, 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to [give *in rem* remedies or] make changes in 'substantive maritime law.'" *Offshore Logistics, Inc. v.*

Tallentire, 477 U.S. 207, 221-222, 91 L. Ed. 2d 174, 106 S. Ct. 2485 (1986) citing Madruga v. Superior Court, 346 U.S. 556, 560-561, n. 12, 98 L. Ed. 290, 74 S. Ct. 298 (1954). Thus state courts may entertain maritime causes of action and may apply state law to supplement federal maritime law if the state law does not conflict with federal law or interfere with its uniformity.

Ascertaining whether application of a particular state law materially frustrates a fundamental tenet of admiralty law is dependent upon the application of a "reverse-Erie analysis." *See Offshore Logistics, Inc. v. Tallentire, 477 U.S. at 207; Garan, Inc. v. M/V Aivik, 907 F. Supp. 397 (S.D. Fla. 1995)*. State law will not apply if: (1) the state law is found to conflict with substantive maritime law, or (2) the state law affects remedies peculiar to maritime law. *See Offshore Logistics, Inc. v. Tallentire,* 477 U.S. at 223. In other words, states may apply state law to supplement maritime law if that application does not flatly contradict maritime law. *See Kossick v. United Fruit Co.,* 365 U.S. at 731, 6 L. Ed. 2d at 56, 81 S. Ct. at 886.; *Muratore v. M/S Scotia Prince,* 656 F. Supp. 471 (D. Maine 1987).

Latman, however, eschews a reverse-Erie analysis and determines that the state's interest in protecting its citizens from allegedly unfair or deceptive consumer acts is a sufficient basis for contradicting federal maritime law. This Court, however, has rejected this justification for contradicting federal maritime law. *See Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) (holding that a state's interest in preventing fraud is insufficient to overcome the countervailing need for state law not to contradict general maritime law).

Under the guise of public policy, the *Latman* court avoids the obvious and material contradictions between FUDTPA and federal law: the differing standards for imposing liability, the conflict between the statutes of limitations, and the availability of attorney's fees.

FDUTPA permits an aggrieved consumer to recover even though he never perceived that the defendant's conduct was deceptive or unfair. *See Badcock v. Myers*, 696 So. 2d 776 (Fla. 1st DCA 1996). (FDUTPA applied in a claim not governed by general maritime law). Thus, the Third District ruled that members of a class proceeding under FDUTPA need not individually prove reliance on the alleged misrepresentations, but that damages and reliance are sufficiently shown simply by the fact that the passenger parted with money for what should have been a "pass-through" port charge, and where the cruise line kept the money. This conclusion presents a material conflict with federal maritime law, which applies the common law of fraud and requires individualized proof of reliance and damages. *See e.g. Black Gold Marine, Inc v. Jackson Marine Co.*, 759 F. 2d 466, 470 (5th Cir. 1985) (to prevail on claim that contract was fraudulently procured, admiralty law requires proof of material misrepresentation, knowledge of falsity, intent to induce reliance, and detrimental reliance). *See also Jose v. M/V Fir Grove*, 765 F. Supp 1015, 1021(D. Or. 1990) (federal court sitting in admiralty applies common law of fraud).

A ruling consistent with federal maritime law would have recognized that maritime law preempts the state consumer protection statute. This is what occurred in *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F. 2d 577, 582 (5th Cir. 1986), where the Fifth Circuit held that the Texas Deceptive Trade Practices Act could not be applied to void a limitation of liability clause in a maritime repair contract because it conflicted with applicable maritime law which validated such clauses.

The ruling was similar to that in *Ingram Barge Co. v. Trifinery, Inc.*, 1991 AMC 1450, 1990 WL 303913 (D.C. Tex. 1990). There the district court ruled found that the consumer statute was preempted because the standard for awarding punitive damages under established maritime

precedent is considerably at variance with that required by the Texas DTPA. The court also reasoned that the DTPA standard of proof, which does not require a showing of proximate cause, "could not be used to usurp this element of the standard of proof applicable to admiralty cases." *Id.* at 9.

Preemption was also the result in *Delta Marine, Inc. v. Whaley*, 813 F. Supp. 414, 416 (E.D. N.C. 1993). There the district court held that admiralty law preempted North Carolina's Unfair and Deceptive Trade Practices Act because North Carolina law allows recovery of treble damages under a much lower standard than that required for recovery of punitive damages by admiralty law. The *Delta Marine* court found that unlike admiralty law, the Act did not require a showing of gross negligence, actual malice or reckless or wanton misconduct before treble damages could be imposed; unlike admiralty law, it merely required that a practice have the capacity to deceive. Thus, the court dismissed the claim brought pursuant to the Act.

The Third District's ruling that reliance and damages can be sufficiently inferred when the cruise lines kept for themselves a portion of money it collected as "port charges" usurps two elements of proof required in fraud claims in admiralty cases. FDUTPA, which is a statute enacted to protect aggrieved consumers that has no counterpart at common law, eliminates many of the burdens of proof required and defenses encountered in common law fraud or breach of warranty suits and thus conflicts with established principles of admiralty law and must be preempted.

Latman overlooks other obvious conflicts as well. FDUTPA provides in sections 501.2105 and 501.211(2), Florida Statutes (1991), that a consumer who has been damaged as a result of a violation of FDUTPA may recover actual damages plus attorney's fees and costs. The attorney's fees provision is inconsistent with the standard

of recovery found in federal law. In *Garan, Inc v. M/V Aivik*, 907 F. Supp 397 (S.D. Fla. 1995), for instance, the court found under a reverse-Erie analysis that a state offer of judgment statute which awarded attorney's fees to the prevailing party conflicted with maritime law. The court in *Doe v. Celebrity Zenith Shipping Corp.*, determining whether the statute applied in a case where a passenger sued a cruise line for negligence, agreed with the *Garan* court. 45 F. Supp 2d 1337 (S.D. Fla. 2001). Similarly, the Third Circuit denied the award of attorneys' fees within the maritime context in *Sosebee v. Rath*, 893 F.2d 54 (3d Cir. 1990). There, Plaintiff sought attorneys' fees pursuant to a Virgin Islands statute which awarded costs to the prevailing party. *Sosebee* at 56. In applying a reverse-Erie analysis, the court determined that "a general award of attorneys' fees pursuant to a state statute which does not require a finding of bad faith directly conflicts with federal admiralty law." *Id. See also Southworth Machinery Co. v. F/V Corey Pride*, 994 F. 2d 37 (1st Cir. 1993) (Puerto Rican law regarding attorney's fees contradicts federal maritime and thus no attorney's fees are permitted). This reasoning clearly applies to FDUTPA cases, in which the statute's attorney's fees provision does not require a finding of bad faith and thus directly conflicts with admiralty law.

FDUTPA contradicts federal maritime law in other ways. 46 U.S.C. §183b authorizes the shortening of the statute of limitations period by the terms of a ticket or passenger contract, provided the ticket does not shorten the period to less than one year. *See e.g., Catterson v. Pacquet Cruises, Inc.*, 513 F. Supp. 645 (S.D.N.Y. 1981); *King v. Eastern Cruise Lines, Inc.*, 722 F.Supp. 709 (S.D. Ala. 1989). The statute of limitations for FDUTPA is four years.

The weight of authority requires this Court to hold that FDUTPA is preempted by admiralty law. *Latman* is thus inconsistent with decisions in federal courts which have

consistently refused to apply state laws to actions governed by federal maritime law where doing so alters the rights and liabilities of the parties. *See In re Amtrak "Sunset Ltd" Train Crash*, 121 F. 3d 1421 (11th Cir 1997) (holding that admiralty law, not Alabama state law, governed wrongful death claims because the Alabama statute conflicted with admiralty law by awarding punitive damages on a showing of simple negligence and forbidding apportionment of damages among joint tortfeasors).

Latman's repercussions are wide-ranging; this case alone involves millions of passenger contracts. More importantly, however, the opinion serves as precedent to state courts in all fifty states which are now free to apply their own consumer protection statutes--with differing standards--to the detriment of federal maritime law.

An analysis of the various DUTPAs of the fifty states shows that application of these statutes to maritime contracts would result in the application of varying standards of intent, materiality, reliance, reasonableness of consumer conduct, statutes of limitations and damages.

The unfair and deceptive trade practices acts of the various states can be categorized into four general categories:

1) statutes that limit claims to specifically defined practices.[3]
2) statutes that add the element of intent[4]
3) statutes that add a scienter requirement;[5]
4) statutes that broadly define unfair and deceptive acts or practices[6]

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[3] Alabama, California District of Columbia, Minnesota, Mississippi, Oregon, Pennsylvania, Virginia.

[4] Arizona, Delaware, Illinois, Iowa, New Jersey, North Dakota, and Utah.

[5] Arkansas, Colorado, Idaho, Indian, Kansas, Nevada, Oklahoma, South Dakota, Wyoming.

A close analysis of the various state DUTPAs reveals that they vary widely with respect to the showing that is necessary to constitute a claim under each particular DUTPA, and have varying statutes of limitations.[7]

For instance, Maine's DUTPA requires a showing of loss causation. The loss causation element also is encompassed in the five-pronged test employed under Washington's DUTPA. *Hangman Ridge Training v. Safeco Title Ins.*, 719 P.2d 531, 539 (Wash. 1986). Texas courts state that without reliance, a deceptive or unfair trade practice could not be the "procuring cause" of damages, which is an element required under the Texas DUTPA. *In re Fiero Production, Inc.*, 102 B.R. 581, 584 (Bankr. W.D.Tex. 1989). Some states, including Arizona, require reliance as a prerequisite to recovery under that state's DUTPA, although a showing of fraud is not necessary. Still other states require a showing of common law fraud or negligent misrepresentation. S*ee Weinberg v. Sun Co., Inc.* 565 Pa. 612 (Pa. 2001).

The obvious result is a large scale assault on the integrity and uniformity of federal maritime law. This Court should exercise its discretionary jurisdiction and address this state court opinion which circumvents the law as articulated by this Court, violates the Supremacy Clause

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[6] Alaska, Connecticut, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin.

[7] For instance, Louisiana Oregon, Arizona, Kentucky and Wyoming have a one year statute of limitations; Texas, Alaska, Ohio, Washington, Indiana, Virginia, Iowa and New Hampshire have a two year statute; Connecticut, Wisconsin, Kansas, Illinois, Missouri, South Carolina, California and Colorado, have three year statute; and Alabama, Massachusetts, Georgia, Florida, Tennessee, North Carolina, Nebraska, and New Mexico have a four year statute. Other states have five and six year statutes of limitations.

of the United States Constitution, and disrupts the uniformity of federal maritime law.

CONCLUSION

Petitioner Norwegian respectfully requests that this Court grant Norwegian's Petition for Certiorari.

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APPENDIX

1 – *Latman v. Costa Cruise Lines,* 758 So. 2d 699 (Fla. 3rd DCA 2000).

2 – *Kloster Cruise Lines, N.V. v. Latman, et al.,* 2000 Fla. Lexis 848 (April 19, 2002).

3 – *Fischlowitz v. Kloster*, Case No. 95-2108-CIV-KING, (S.D. Fla., April 2, 1996). Order granting Defendant's Motion to Dismiss Second Amended Complaint.

4 – *Latman, et al. v. Costa Cruise*, (consolidated), Case No. 18139-CA (03), 11th Judicial Circuit, March 8, 1999. Order Denying Plaintiffs' Motion for Class Certification.

5 – Fla. Stat. § 501.201.

#114724

*758 So. 2d 699, *; 2000 Fla. App. LEXIS 915, **; 25 Fla. L. Weekly D 309*

TRUDY LATMAN, NATHAN LATMAN, ROSEMARIE TEITLER, PATRICIA ESPINET, RHONDA KATZ, LARRY KATZ, JOYCE KAPLAN, CAROL DAILEY, and WILLIAM DAILEY, individually and on behalf of all others similarly situated, Appellants, vs. COSTA CRUISE LINES, N.V., KLOSTER CRUISE LINES, and CARNIVAL CRUISE LINES, Appellees.

CASE NOS. 3D99-852, 3D 99-853, 3D 99-854

COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

758 So. 2d 699; 2000 Fla. App. LEXIS 915; 25 Fla. L. Weekly D 309

February 2, 2000, Opinion Filed.

SUBSEQUENT HISTORY: [**1] Petition for Review Dismissed October 22, 2001, Reported at: *2001 Fla. LEXIS 2153*. Rehearing Denied May 31, 2000. Released for Publication May 31, 2000.

PRIOR HISTORY: An appeal from a non-final order from the Circuit Court for Dade County, Stuart M. Simons, Judge. LOWER TRIBUNAL NOS. 96-3450. 96-8076. 96-8078. 96-18139.

DISPOSITION: Reversed and remanded.

COUNSEL: Robert C. Gilbert; Burt & Pucillo, LLP.; Zwerling, Schachter & Zwerling, LLP, and Joseph Lipofsky and Robert S. Schachter, for appellants.

Hicks & Anderson, P.A., and Mark Hicks and Gary A. Magnarini; Mase & Gassenheimer, P.A.; Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., and Joel Perwin; Paul, Weiss, Rifkind, Wharton & Garrison and Lewis

R. Clayton and Steven C. Herzog; Rodriguez & Aronson, for appellees.

JUDGES: Before COPE, GREEN and FLETCHER, JJ.

OPINION BY: COPE

OPINION: COPE, J.

In these three consolidated appeals, class action plaintiffs appeal an order denying class certification. We conclude that class certification should have been granted, and reverse the order under review.

The plaintiffs are cruise passengers who traveled on Carnival Cruise Lines, Costa Cruise Lines, N.V., and Kloster Cruise Lines. For the time period at issue here, the passengers' ticket price was calculated as [**2] follows: (a) cruise price + (b) port charges = (c) total ticket price. The term "port charges" was not defined.

Plaintiffs contend that the term "port charges" necessarily informs the consumer that these are "pass-through" charges paid by the cruise line to the relevant port authorities. Plaintiffs allege, and for present purposes it is accepted as true, that in fact the cruise lines passed through only a portion of the port charges to third parties, and kept the remainder for themselves. Plaintiffs alleged that this practice--collecting port charges but keeping a part of the port charges for their own account--amounted to an unfair and deceptive trade practice for purposes of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). See §§ 501.201-.213, Fla. Stat. (1991). n1

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

N1 Because the plaintiffs' earliest claims are for cruises purchased in 1992, we refer to the 1991 version of FDUTPA. The statute has been subsequently amended from time to time, but not in ways material to the present analysis.

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

[**3]

In 1996, plaintiffs filed class action complaints against the defendant-appellee cruise lines, contending that the cruise lines should repay to the passengers those amounts which were collected as "port charges" but which the cruise lines kept for themselves. The trial court denied the motion for class certification. The plaintiffs have appealed.

II.

Although not the basis of the trial court's ruling, the cruise lines' threshold argument is that the FDUTPA is completely displaced by maritime law and can have no application to a passenger cruise ticket. They point out that a passenger cruise ticket is a maritime contract, see 1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 5-5, at 168 (2d ed. 1994), and say that maritime law necessarily governs to the exclusion of state law. We disagree.

The United States Supreme Court has said, "'It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] but this limitation still leaves the States a wide scope.'" *American Dredging Co. v. Miller, 510 U.S. 443, 452, 127 L. Ed. 2d 285, 114 S. Ct. 981 (1994)* (citation omitted). A state [**4] remedy is permissible unless it "'works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.'" Id. at 447 (citations omitted).

Florida has a substantial interest in preventing deceptive and unfair trade practices, as thoroughly explained by the Fourth District in *Renaissance Cruises, Inc. v. Glassman, 738 So. 2d 436, 438-40 (Fla. 4th DCA 1999)*. That is especially so where, as here, these cruise lines have their respective national headquarters within the State of Florida, and the passenger tickets specify Florida as the forum for litigation. See id. at 439. We are unable to see how the enforcement of state law against deceptive and unfair trade practices would work material prejudice to the characteristic features of the general maritime law, or interfere with its proper harmony and uniformity. See *American Dredging*, 510 U.S. at 447; *Renaissance Cruises*, 738 So. 2d at 439-40; see also *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206-07, 133 L. Ed. 2d 578, 116 S. Ct. 619 (1996); [**5] *Kossick v. United Fruit Co.*, 365 U.S. 731, 741, 6 L. Ed. 2d 56, 81 S. Ct. 886 (1961); *In the Matter of Nautilus* [*702] *Motor Tanker Co.*, 900 F. Supp. 697, 702-05 (D.N.J. 1995); F/*V Robins Nest, Inc. v. Atlantic Marine Diesel, Inc.*, 1994 U.S. Dist. LEXIS 15403, Civ. A. No. 92-3900 (JEI), 1994 WL 594592, at *2-3 (D.N.J. Oct. 24, 1994); *Hoddevik v. Arctic Alaska Fisheries Corp.*, 94 Wn. App. 268, 970 P.2d 828, 834-35 (Wash. Ct. App. 1999). We conclude that FDUTPA is applicable here and reject the cruise lines' argument to the contrary. n2

----------Footnotes----------

n2 The Florida Attorney General has asserted jurisdiction under FDUTPA, in an inquiry regarding the cruise lines' port charges.

In 1997 Carnival and Kloster entered into an "Assurance of Voluntary Compliance" with the Florida Attorney General which effectively limited port charges to those imposed by a

governmental or quasi-governmental authority. The agreement was made without any admission that there had been any violation of law, and without prejudice to the cruise lines' position in any pending or future litigation.

----------End Footnotes----------

[**6]

III.

We now turn to the merits of the order denying class certification. We glean from the trial court's order that the court concluded plaintiffs had not correctly analyzed their cause of action under FDUTPA. As we interpret the order, the court reasoned that once FDUTPA was properly interpreted, individual issues of reliance and damages on the part of the class members would outweigh any issues common to the class. The court thus denied class certification.

Plaintiffs argue that it was inappropriate for the trial court to conduct any inquiry into the elements of plaintiffs' claims in deciding a motion for class certification. We disagree. Florida Rule of Civil Procedure 1.220 itself requires the court to consider the claims or defenses of the representative parties and whether they raise questions of law or fact common to the class, id. R. 1.220(a)(2); whether class claims or defenses predominate over questions of law or fact affecting only individual members of the class, id. R. 1.220(b)(3); and "all relevant facts and circumstances." Id. (emphasis added); see *Dept. of Agriculture v. Varela*, 732 So. 2d 1146 (Fla. 3d DCA), review denied, [**7] 744 So. 2d 459 (Fla. 1999). In performing the required analysis under Rule 1.220, the court necessarily had to consider the law applicable to plaintiffs'

claims in order to decide whether those claims were maintainable as a class action.

FDUTPA is a consumer protection statute, see § 501.202(2), Fla. Stat. (1991), which states in part that "unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Id. § 501.204(1). The statute creates a private cause of action for consumers: "In any individual action brought by a consumer who has suffered a loss as a result of a violation of this part, such consumer may recover actual damage, plus attorney's fees and court costs . . . ." Id. § 501.211(2).

The cruise lines argue that FDUTPA requires the plaintiffs to demonstrate reliance and damages, and that this will necessarily entail case-by-case adjudication which is inappropriate for class consideration. The cruise lines contend that reliance and damages in most cases cannot be shown, because the ticket states (a) the cruise price, (b) the port charges, and (c) the total price. The port charges [**8] are not a later "add on," but are instead a flat amount stated in advance. Thus, the consumer knows at the outset the total price for the cruise, and can make a decision whether that total price is acceptable or not.

In these cases the named plaintiffs testified they were willing to pay, and did pay, the quoted fare for the cruises and were happy with the cruises they took. At the time they purchased their tickets, some of the cruise passengers were given the separate breakdown for the cruise charge and the port charges, while others were only given the total cruise price. The cruise lines argue that absent some indication that the consumers were influenced in [*703] some way by the port charges, there is neither reliance nor resulting damage under FDUTPA. More to the point, the cruise lines argue that to determine whether there was individual reliance and resulting damage in any

individual case, there must necessarily be a case-by-case inquiry, which is not suitable for a class action.

We conclude that the cruise lines read FDUTPA too narrowly and would illustrate with the following example. Suppose that a company systematically overcharges its customers on sales tax. The hypothetical [**9] company pays the state the sales tax that it owes, and then keeps the overcharge for itself.

We would not hesitate to say that an intentional overcharge of sales tax, which is kept by the company itself, is an unfair and deceptive trade practice and that the consumer must be repaid. That is so even though the consumers clearly were willing to pay the price charged--in the hypothetical example, they actually paid the sales tax overcharges--nor would it make a difference that the consumers paid no attention to the sales tax amount. We think such a claim would be actionable under FDUTPA. See *W.S. Badcock Corp. v. Myers*, 696 So. 2d 776, 778-79 (Fla. 1st DCA 1996) (class certified under FDUTPA for claim that *Badcock* impermissibly charged consumers a seven dollar non-filing fee in connection with purchases of consumer goods it sold and financed); see also *Execu-Tech Business Systems Inc. v. New Oji Paper Co., Ltd.*, 752 So. 2d 582, 2000 Fla. LEXIS 65, 25 Fla. Law W. S 40 (Fla. 2000)(class action under FDUTPA to recover damages for price fixing).

The same logic applies here. For purposes of FDUTPA, we think the inquiry is how a reasonable consumer would interpret the term "port charges." The [**10] term necessarily constitutes a representation to a reasonable consumer that these are "pass-through" charges which the cruise line will pay to the relevant port authorities (and possibly others n3).

- - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -

n3 We need not now decide whether we agree with the Fifth District's definition of port charges contained in *Premier Cruise Lines, Ltd. v. Picaut,* 746 So. 2d 1132, 1999 Fla. App. LEXIS 13969, 24 Fla. Law W. D 2422 (5th DCA 1999), which includes port-side expenses associated with the port stay (regardless of whether paid to public or private third parties), while the plaintiffs contend that the term "port charges" means only those charges that are paid to a governmental or quasi-governmental port authority.

We do not need to resolve that issue at this time because under either definition, the term "port charges" indicates to a reasonable consumer that they are payments to third persons, not payments which are to be kept by the cruise lines themselves.

----------End Footnotes----------

As the Michigan Supreme Court said in a comparable context, "We hold that members of a class [**11] proceeding under the Consumer Protection Act need not individually prove reliance on the alleged misrepresentations. It is sufficient if the class can establish that a reasonable person would have relied on the representations." *Dix v. American Bankers Life Assurance Co.,* 429 Mich. 410, 415 N.W.2d 206, 209 (Mich. 1987) (footnote omitted); see *Weitzel v. Barnes,* 691 S.W.2d 598, 600 (Tex. 1985); see also *Orkin Exterminating Co. v. Federal Trade Commission,* 849 F.2d 1354, 1368 (11th Cir. 1988); *Trans World Accounts, Inc. v. Federal Trade Commission,* 594 F.2d 212, 214 (9th Cir. 1979); § 501.204(2), Fla. Stat. (1991).

We therefore conclude that where the cruise line bills the passenger for port charges but keeps part of the money for itself, that is a deceptive practice under FDUTPA. Reliance and damages are sufficiently shown by the fact that the passenger parted with money for what should have been a "pass-through" port charge, but the cruise line kept the money.

We note that the Fourth and Fifth District Courts of Appeal have already allowed comparable class actions to proceed in their respective [**12] jurisdictions. See *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d at 437; *Premier Cruise Lines, LTD., v. Picaut*, 746 So. 2d 1132, 1999 Fla. App. LEXIS 13969, *5-6, 24 Fla. Law W. at D 2423.

[*704] The cruise lines argue that they have no liability under FDUTPA because in numerous instances they sold their tickets through travel agents, and never communicated directly with the consumers. That makes no difference. Whether the travel agent is viewed as being an agent of the passenger, or the cruise line, the cruise line elected to itemize an amount on the ticket for port charges, and determined the disposition of funds. Whether the ticket was purchased through a travel agent is irrelevant to the underlying analysis.

We see no merit to the cruise lines' other objections to class certification. The orders under review must therefore be reversed and the cause remanded with directions to certify the class actions.

IV.

The cruise lines next argue that the passenger ticket contains a limitation requiring a written notice of claim to be submitted to the cruise line within 185 days, and suit to be brought within one year, after the injury complained of. They point out that only a handful of written claims were submitted [**13] complaining about the port charges. Their position is that as a prerequisite to maintaining a class action, every member of the class must submit a written claim in accordance with the limitation period contained on the ticket.

We reject this argument. clscc7clscc7Assuming that the contractual limitation period is valid and applicable, it is

sufficient if the contract provision is satisfied, or compliance is excused, as to the class plaintiffs. See *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1336-37 (11th Cir. 1984) (citing, inter alia, *American Pipe & Construction Co.* v. Utah, 414 U.S. 538, 551, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974)).

Because the trial court did not rule on any issue regarding the validity or applicability of the contractual limitation periods contained in these tickets, we decline to reach those issues here. They should be considered in the first instance by the trial court on remand.

For the reasons stated, the order under review is reversed and the cause remanded for further proceedings consistent herewith.

#114752

*2002 Fla. LEXIS 848, **

KLOSTER CRUISE LINES, N.V., ETC., Petitioner(s) vs. TRUDY LATMAN, ET AL., Respondent(s)

CASE NO.: SC00-1462

SUPREME COURT OF FLORIDA

2002 Fla. LEXIS 848

April 19, 2002, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Lower Tribunal No.: 3D99-853, 3D99-854, 3D99-852.

JUDGES: WELLS, C.J., and SHAW, HARDING, ANSTEAD and QUINCE, JJ., concur.

OPINION: This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

APPENDIX 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-2108-CIV-KING
Magistrate Judge Johnson

ARLEN FISCHLOWITZ and
PATRICIA FISCHLOWITZ, on
Behalf of themselves and all other persons
Similarly situated,

Plaintiffs,

v.

KLOSTER CRUISE LIMITED, a
Bermuda corporation, d/b/a
NORWEGIAN CRUISE LINE,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

THIS CAUSE comes before the Court upon Defendant's Motion to Dismiss Second Amended Complaint, filed December 26, 1995. Plaintiffs requested and received two extensions of time, pursuant to which their response was due January 31, 1996. On January 30, 1996, Plaintiffs requested yet another extension of time in which to respond. By Order dated March 8, 1996, this Court denied Plaintiffs' motion for extension of time. Plaintiffs filed their response on March 4, 1996, and Defendant filed its reply on March 12, 1996.

APPENDIX 3

I. Procedural Background

Plaintiffs seek to hold Defendant cruise line liable for alleged misconduct in the charging of certain port fees and taxes. Their Complaint, which includes a request for certification of a plaintiff class, was filed September 26, 1995. Jurisdiction was premised on 33 U.S.C. § 1518(c), the Deepwater Port Act. Before Defendant filed its (first) motion to dismiss or other responsive pleading, Plaintiffs filed their Motion to Amend Complaint. The Court denied the motion to dismiss and deemed Plaintiffs' Amended Complaint filed.

The Amended Complaint was identical to the first save the jurisdictional allegation, now premised in admiralty. Defendant filed its (second) motion to dismiss, arguing that Plaintiffs failed to meet the two-part test for determining the existence of federal maritime tort jurisdiction. See Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 261-62 (1971). Noting the then-nascent stage of the litigation, the Court granted Plaintiffs leave to file their Second Amended Complaint and denied Defendant's motion to dismiss as moot.

Plaintiffs' third attempt at jurisdiction is made pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq. Defendant has once again moved to dismiss.

II. Legal Standard

A motion to dismiss will be granted where it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. "[D]ismissal is justified only when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim." 5A Wright & Miller, Federal Practice and Procedure, § 1357; see also Bradberry v. Pinellas County, 789 F.2d

1513, 1515 (11th Cir. 1986). For the purposes of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and all facts alleged by the plaintiff are accepted as true. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). The issue is not whether the plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

III. Analysis

Plaintiffs' Second Amended Complaint alleges federal jurisdiction pursuant to 18 U.S.C. § 1964(c). Section 1964 creates a civil cause of action for "[a]ny person injured in his business or property by reason of a violation" of 18 U.S.C. § 1962. The latter makes it unlawful for a person

> employed by or associated with any enterprise engaged in, or the activities of which affect, , interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises, affairs or a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (emphasis added).

A "pattern of racketeering activity" consists of "at least two distinct but related predicate acts." Pelletier v. Zweifel, 921 F.2d 1465, 1996 (11th Cir. 1991). "Predicate acts" include mail fraud. 18 U.S.C. § 1961(1). Such acts are said to be related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Pelletier, 921 F.2d at 1496-97 (citations omitted). In order to recover under civil RICO, Plaintiffs' injury "must 'flow from the commission of the predicate acts.'" Pelletier, 921 F.2d at

1497 (quoting Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 n.14 (1985)).

Plaintiffs' burden, therefore, is to show that their injury resulted from Defendant's acts of deception. Sedima, 473 U.S. at 496; O'Malley v. O'Neill, 887 F.2d 1557, 1563 (11th Cir. 1989). In determining whether Plaintiffs have successfully alleged the foregoing, the Court looks only to the allegations contained in the Second Amended Complaint. Milburn v. U.S., 734 F.2d 762, 765 (11th Cir. 1984); O'Connor v. Kawaski Motors Corp., 699 F. Supp. 1538, 1542 (S.D. Fla. 1988) ("Consideration of matters beyond the four corners of the complaint is improper.")

The gravemen of Plaintiffs' Second Amended Complaint is that "[a]s part of a uniform scheme to defraud its customers, and to increase its profits, [Defendant] used false pretenses and misrepresentations calculated to deceive persons of ordinary prudence by misrepresenting the amount of port charges applicable to cruises taken on [Defendant's] vessels." (Compl. ¶ 15.) They allege RICO liability due to Defendant's purported use of the United States mail to distribute "false advertising brochures, contracts, invoices, and ticketing information." (Compl. ¶ 16.) Plaintiffs conclude by alleging that they "have been injured by reason of [Defendant's] violations of 18 U.S.C. 1962(c)...." (Compl. ¶ 19.)

Plaintiffs allege that they paid Defendant the sum of two hundred ninety-seven dollars ($297.00) "based upon [Defendant's] representations that the Plaintiffs were liable to some port authority for the payment of such port charges." (Compl. ¶ 9.) Plaintiffs, who traveled on Defendant's cruise ship with their child, were charged ninety-nine dollars ($99.00) per passenger. (Compl. ¶ 2.) They claim that "the costs for the port charges actually attributable to [Plaintiffs] in connection with their 1995

cruise with [Defendant] were substantially less than [$297.00]." (Compl. ¶ 10.)

In support of their allegations, Plaintiffs have attached relevant portions of Defendant's 1995-1996 advertising brochure. (Compl. Ex. A.) Plaintiffs also rely on "various newspaper advertisement [sic]" containing the alleged misrepresentation. (Compl. ¶ 8.) Their only specific reference is to an advertisement that appeared in the September 17, 1995, issue of the Fort Lauderdale Sun Sentinel; attached to the Complaint as Exhibit "B."

The Court will disregard Plaintiffs' reliance on the Sun Sentinel advertisement. Plaintiffs claim to have contracted and traveled with Defendant "[d]uring the summer of 1995." (Compl. ¶ 5.) It strains credulity to argue that Plaintiffs relied on an alleged misrepresentation that occurred after the summer months and approximately nine days before the filing of the initial complaint. It is axiomatic that a misrepresentation must be known about and relied upon in order to be actionable. As a practical matter, and as a matter of law, Plaintiffs could not have relied upon an alleged misrepresentation in the September 17, 1995, Sun Sentinel advertisement.

Plaintiffs' claim thus hinges on the statements contained in Defendant's advertising brochure. Page ninety-nine of the brochure describes what is included in the "cruise rate," and goes on to state that "[t]here is a fee for port charges and government fees and taxes." (Compl. Ex. A.) Plaintiffs do not argue that Defendant charged them and their fellow travelers a sum different than that which they had been quoted. They argue instead that the sum charged encompassed substantially more than the actual monies owed by Defendant to government and port authorities.

The Court is unable to discern the injury that resulted to Plaintiffs from Defendant's alleged misrepresentation. Plaintiffs do not allege that knowledge

of the "true" amount of the additional charges would have influenced their decision to enter into the contract with Defendant. Cf. O'Malley v. O'Neill, 887 F.2d 1557, 1563 (11th Cir. 1989. In O'Malley, the United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of the plaintiffs' RICO claim due to a lack of standing. The O'Malley Court looked to the decision of the United States Court of Appeals for the Fifth Circuit in Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211 (5th Cir. 1989). In Cullom, the Fifth Circuit concluded that the plaintiff-employees were not the targets or victims of the predicate acts of mail fraud, and reasoned that the aggrieved parties were "members of the general public who would rely on the inaccurate financial statements to make investment decisions" about the defendant-bank. O'Malley, 887 f.2d at 1563 (discussing Cullom, 859 F.2d at 1216.)

Similarly, the Eleventh Circuit was faced with a RICO claim by employees who were terminated because of their inability to participate in allegedly illegal activity. It was persuaded by the Fifth Circuit's reasoning and held that the causation requirement of Section 1964(c) was not satisfied. O'Malley, 887 F.2d at 1563.

Here, Plaintiffs have failed to point to a misrepresentation by Defendant about which they knew, and on which they relied to their detriment in contracting with Defendant. Defendant represented that it would charge a certain amount for additional charges incident to travel on its ship, and then proceeded to charge that amount. Plaintiffs have not met the casual requirement to maintain a claim under RICO. See Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985; O'Malley, 887 F.2d at 1563. They are, therefore, not entitled to present evidence to support their claim. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

IV. Conclusion

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint be, and the same is hereby GRANTED and Plaintiffs' federal law claim (Count I) DISMISSED WITH PREJUDICE. Plaintiffs' state law claims (Counts II-IV) are DISMISSED WITHOUT PREJUDICE to refile in state court.

DONE and ORDERED in Chambers at the United States District Courthouse, Federal Justice Building, Miami, Florida, this 2nd day of April, 1996.

JAMES LAWRENCE KING
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Keith A. Goldbaum, Esq.
Curtis J. Mase, Esq.
Richard N. Bell, Esq.

#114924

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 96-3450-CA-03
96-8076-CA-03
96-8078-CA-03
96-18139-CA-03

Arnold Koenig,

Plaintiff,

vs.

Ulyssess Cruises, Inc.,

Defendant,

_____/

Patricia Espinet,

Plaintiff,

vs.

Kloster Cruise, LTD.,

Defendant,

_____/

Michell Hackbarth,

Plaintiff,

vs.

Carnival Cruiseline,

Defendant,

_____/

APPENDIX 4

Trudy Latman,

Plaintiff,

vs.

Costa Cruise Lines,

Defendant.

_____/

Plaintiffs move this court to certify a class pursuant to Fla.R.Civ.P. 1.220. The proposed class would consist of all U.S. residents who cruise on a vessel owned or operated by any of the Defendants, and whose class members would not have to demonstrate that they were in any way aware of the facts or circumstances comprising the alleged deception. Moreover, proposed class Plaintiffs would need make no showing of a casual link or nexus between the improper conduct allegedly engaged in by the Defendants and the harm allegedly suffered by the Plaintiffs nor would they need to show any deception practiced upon them nor that they were in fact aggrieved by any deception. The alleged unfair trade practice would take place under the proposed theory even if there is no showing of any advertisement or communication of anything pertaining to any "port charge." The "pricing" strategy involved in pricing the cruises would in fact be the unfair trade practice even if it took the form of an internal policy never communicated to any customer and not insidious on its own (contrary to "price fixing" cases) For these and for other and further good and valid reasons as disclosed in the record. It is therefore,

ORDERED and ADJUDGED that the Plaintiffs' Motion for Class Certification is **Denied**.

DONE and ORDERED in Chambers at Miami, Dade County, Florida this 8th day of March, 1999.

Judge STUART M. SIMONS
CIRCUIT JUDGE

Copies furnished to:
Counsel/Parties of Record

#114978

Fla. Stat. § 501.201
FLORIDA STATUTES 2000

TITLE XXXIII REGULATION OF TRADE, COMMERCE, INVESTMENTS, AND SOLICITATIONS
CHAPTER 501 CONSUMER PROTECTION
PART II DECEPTIVE AND UNFAIR TRADE PRACTICES
Fla. Stat. § 501.201 (2000)
501.201 Short title.

This part shall be known and may be cited as the "Florida Deceptive and Unfair Trade Practices Act."

TITLE XXXIII REGULATION OF TRADE, COMMERCE, INVESTMENTS, AND SOLICITATIONS
CHAPTER 559 REGULATION OF TRADE, COMMERCE, AND INVESTMENTS, GENERALLY PART XI SELLERS OF TRAVEL
Fla. Stat. § 559.934 (2000)
559.934 Deceptive and unfair trade practice.

Acts, conduct, practices, omissions, failings, misrepresentations, or nondisclosures which constitute a violation of this part also constitute a deceptive and unfair trade practice for the purpose of s. 501.201 and administrative rules promulgated thereunder.

ARCHIVE MATERIAL

APPENDIX 5

THIS DOCUMENT IS CURRENT THROUGH THE 2000 REGULAR LEGISLATIVE SESSION

TITLE XXXIII REGULATION OF TRADE, COMMERCE, INVESTMENTS, AND SOLICIATIONS

CHAPTER 501 CONSUMER PROTECTION

PART II DECEPTIVE AND UNFAIR TRADE PRACTICES

Fla. Stat. § 501.2105 (2000)

501.2105 Attorney's fees.

(1) In any civil litigation resulting from an act or practice involving a violation of this part, except as provided in subsection (5), the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorney's fees and costs from the nonprevailing party.

(2) The attorney for the prevailing party shall submit a sworn affidavit of his or her time spent on the case and his or her costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

(3) The trial judge may award the prevailing party the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit.

(4) Any award of attorney's fees or costs shall become a part of the judgment and subject to execution as the law allows.

(5) In any civil litigation initiated by the enforcing authority, the court may award to the prevailing party reasonable attorney's fees and costs if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.

(6) In any administrative proceeding or other nonjudicial action initiated by an enforcing authority, the attorney for the enforcing authority may certify by sworn affidavit the number of hours and the cost thereof to the enforcing authority for the time spent in the investigation and litigation of the case plus costs reasonably incurred in the action. Payment to the enforcing authority of the sum of such costs may be made by stipulation of the parties a part of the final order or decree disposing of the matter. The affidavit shall be attached to and become a part of such order or decree.

HISTORY: s. 1, ch. 73-124; s. 5, ch. 79-386; s. 11, ch. 93-38; s. 4, ch. 94-298; s. 632, ch. 97-103.

Fla. Stat. § 501.211
FLORIDA STATUTES 2000

*** ARCHIVE MATERIAL ***
*** THIS DOCUMENT IS CURRENT THROUGH THE 2000 REGULAR LEGISLATIVE SESSION ***
TITLE XXXIII REGULATION OF TRADE, COMMERCE, INVESTMENTS, AND SOLICITATIONS
CHAPTER 501 CONSUMER PROTECTION
PART II DECEPTIVE AND UNFAIR TRADE PRACTICES
Fla. Stat. § 501.211 (2000)
501.211 Other individual remedies.

(1) Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates

this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.

(2) In any individual action brought by a consumer who has suffered a loss as a result of a violation of this part, such consumer may recover actual damages, plus attorney's fees and court costs as provided in s. 501.2105; however, no damages, fees, or costs shall be recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

(3) In any action brought under this section, upon motion of the party against whom such action is filed alleging that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may, after hearing evidence as to the necessity therefor, require the party instituting the action to post a bond in the amount which the court finds reasonable to indemnify the defendant for any damages incurred, including reasonable attorney's fees. This subsection shall not apply to any action initiated by the enforcing authority.

HISTORY: s. 1, ch. 73-124; s. 37, ch. 91-220; s. 12, ch. 93-38.

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Supreme Court, U.S.
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No. 02-122

IN THE

Supreme Court of the United States

KLOSTER CRUISE LINES N.V., d/b/a
NORWEGIAN CRUISE LINE,

Petitioner,

v.

PATRICIA ESPINET, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Petitioner Kloster Cruise Lines, N.V. d/b/a Norwegian Cruise Line's ("Norwegian") statement of the case in its Petition for Writ of Certiorari (the "Petition) is misleading and contains facts which are irrelevant.

Norwegian seeks review of an interlocutory decision by a state appellate court which reversed a trial court's denial of class certification in a class action filed in 1996 in the Circuit Court of Miami-Dade County, Florida (the "Action"). The Action seeks damages and other relief on behalf of Norwegian cruise passengers based on deceptive statements contained in Norwegian's marketing and sales materials concerning its billing and collection of "port charges" or "port taxes" (hereinafter "Port Charges"). Substantially similar lawsuits were filed against other cruise lines, including Carnival Cruise Lines ("Carnival") and Costa Cruise Lines, N.V. ("Costa"). Although the interlocutory appellate decision giving rise to Norwegian's petition refers to three consolidated appeals, only the Action against Norwegian is the subject of this Petition.[1]

Plaintiffs-Respondents (hereinafter "plaintiffs" or ("Respondents") are U.S. residents who paid Port Charges to Norwegian. Their central allegation is that the Port Charges billed and collected by Norwegian from its customers greatly exceeded the amounts paid by Norwegian to port authorities. Instead, plaintiffs allege that much of the revenue collected under the guise of Port Charges was actually retained by Norwegian for its own use and benefit, representing an

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1. The class action case against Carnival was settled following issuance of the decision at issue. The class action case against Costa remains pending in the trial court. Costa did not seek further review following issuance of the instant decision.

improper hidden profit in light of Norwegian's advertised "all-inclusive" cruise fares.

The Action asserts three causes of action under Florida's consumer protection statute, the Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.* ("FDUPTA"), and a common law cause of action for unjust enrichment. The FDUPTA claims seek declaratory and injunctive relief and recovery of damages based on Norwegian's deceptive and unfair conduct. The common law claim seeks damages only.

On February 6, 1998, the trial court denied Norwegian's motion to dismiss the complaint based, in part, on Norwegian's assertion that FDUPTA was inconsistent with admiralty law.

On March 8, 1999, the trial court denied plaintiffs' motions for class certification. An interlocutory appeal ensued pursuant to Fla. R. App. P. 9.130(a)(6). On February 2, 2000, the Florida Third District Court of Appeal ("Third District") reversed and remanded the case to the trial court with directions to certify the Action as a class action.

Norwegian sought rehearing and rehearing *en banc* before the Third District which was denied on May 31, 2000. Norwegian then sought discretionary review by the Florida Supreme Court which was denied on April 19, 2002.[2] Norwegian's Petition to this Court followed.[3]

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2. Carnival likewise sought discretionary review by the Florida Supreme Court following denial of rehearing by the Third District. The class action settlement with Carnival was reached and approved while the petition for discretionary review was pending, at which time Carnival voluntarily dismissed its petition.

3. Further proceedings in the trial court against Norwegian have been stayed pending disposition of its petition to this Court.

In its Petition, Norwegian, refers to a federal case, *Fischlowitz v. Kloster Ltd.*, No. 95-2108-CIV-King (S.D. Fla.), as though it is, or was, part of the Action. Norwegian even attaches an order from *Fischlowitz* to the Petition (Appendix 3) in such a manner as to suggest that it is part of the case history of the Action. That is not correct. Nevertheless in *Fischlowitz*, Norwegian successfully argued that claims based on alleged misleading advertisements concerning port charges do *not* create federal admiralty jurisdiction. *See Defendant's Motion to Dismiss Plaintiffs' Amended Complaint* annexed hereto as Respondents' Appendix A. Norwegian's position abruptly changed after the interlocutory decision of the Third District certifying the Action as a class action under FDUPTA.

Despite Norwegian's dissatisfaction with the Third District's decision, that interlocutory decision does not create the jurisdictional basis for this Court's discretionary review.

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction to Review the Interlocutory Order That is the Basis for Norwegian's Petition

Norwegian asserts that jurisdiction is proper pursuant to 28 U.S.C. § 1257. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court identified four categories of cases which could be taken for review by treating the decision on the federal issue as a final judgment for purposes of satisfying the requirements of 28 U.S.C. § 1257, even though there were additional proceedings to be held in the state court. *Id.* at 477. This Action does not fit into any of the categories authorized by the *Cox* Court.

As a threshold matter, the Court cannot review federal question decisions made by state courts until judgment in the case is final. *Jefferson v. City of Tarrant*, 522 U.S. 75, 80 (1997). In *Jefferson*, the Alabama Supreme Court determined the federal law issue on an interlocutory appeal, then remanded the case for further proceedings. This Court held that it lacked jurisdiction over this non-final determination, noting that "[t]he outcome of those further proceedings could moot the federal question we agreed to decide. If the federal question does not become moot, petitioners will be free to seek our review when the state-court proceedings reach an end." *Id.* at 77-78. Likewise, in this Action, the Third District reversed a decision on class certification and remanded the matter to the trial court for further proceedings that could moot the issue Norwegian presents to this Court. The Florida Supreme Court unanimously chose not to review that decision.

As in *Jefferson*, the decision by the Third District was not a final judgment. There has been no trial on the merits or even a motion by Norwegian for summary judgment. Moreover, there has been no definitive resolution of the issue presented to this Court by the Florida Supreme Court, which simply chose not to review the decision of the intermediate court. Subsequent decisions by the trial court, however, will be subject to plenary appeal. Also similar to *Jefferson*, the court's decision affected only some of the counts in the complaint. Neither the trial court nor the Third District has issued a ruling on plaintiffs' unjust enrichment claim. Thus, as in *Jefferson*, the Action has not progressed to the point where the decision of the Third District is "an effective determination of the litigation." *Id.* at 81.

The *Jefferson* Court considered the four *Cox* categories and found that none applied. The same is true here.

The first category includes cases that have been essentially decided by the state court's ruling on the federal question. The Action clearly does not fit into this category.

The second category requires that "[n]othing that could happen in the course of the [further proceedings], short of settlement of the case, would foreclose or make unnecessary decision on the federal question." *Cox*, at 480. In addition, the further proceedings in the state court cannot "remotely give rise to a federal question . . . that may later come here." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127 (1945). Review is precluded on both of these grounds. There are many issues which could arise in the trial court in its ultimate consideration of the merits of the Action, which could give rise to federal questions. In *Florida v. Thomas*, 532 U.S. 774 (2001) the Court concluded it did not have jurisdiction to review a decision of the Florida Supreme Court because, among other reasons, it could not assume that no additional federal questions would arise. *Id.* at 779.

The third category includes those cases where it would not be possible to review the federal issues whatever the ultimate outcome of the case. "[I]n these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Cox*, 420 U.S. at 481. This category generally applies to cases involving criminal or administrative law which do not allow for appeal or retrial of issues. None of the substantive issues in the Action have been decided on the merits. As the Court

in *Jefferson* held, once the case is completed, parties can seek review in the Supreme Court on any federal questions, even if the state court "adheres to its interlocutory ruling as 'law of the case.' " 522 U.S. at 82-83. This is so because the Supreme Court has "jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings], . . . and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case." *Hathorn v. Lovorn*, 457 U.S. 255, 261 (1982) (quoting *Reece v. Georgia*, 350 U.S. 85, 87 (1955)). Regardless of the outcome of the Action, at the conclusion of the state court proceedings, this Court could review any decision interpreting federal law. Thus, this Court lacks jurisdiction to review the Petition under the third category set forth in *Cox*.

The final category recognized in *Cox* includes cases where the federal issue has been finally decided and reversal on the federal issue

> would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue which itself has been finally determined by the state courts for purposes of the state litigation.

Cox, 420 U.S. at 780.

The Florida Supreme Court's denial of review did not constitute the end of the action on any claim, but merely the return of the Action to the trial court for further proceedings on the merits. On plenary appeal following adjudication on the merits, the Third District or the Florida Supreme Court could decide to consider the admiralty jurisdiction question, even if the instant decision is considered to be the law of the case. This is so because in Florida, "the law of the case doctrine is more flexible than res judicata in that it also provides that an appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.' " *Florida Dep't of Transp. v. Juliano*, 801 So.2d 101, 106 (Fla. 2001).

Moreover, the Third District's determination concerning the application of maritime law will not "seriously erode federal policy." Nor will it leave a "significant gap in the uniformity of federal maritime law" as Norwegian asserts. This Action is but one of many similar actions against cruise companies concerning the misleading nature of Port Charges. *See, e.g., Pickett v. Holland America Line-Westours, Inc.*, 35 P.3d 351 (2001); *Renaissance Cruises, Inc. v. Glassman*, 738 So.2d 436 (Fla. 4th DCA 1999). In most of these actions, the cruise lines asserted the applicability of admiralty law at some point during the litigation. In the *Holland* case, for instance, the trial court ruled in 1996 that maritime law did not govern the action, and the Washington appellate court denied review in 1997. *Pickett v. Holland America Line-Westours, Inc.*, No. 39791-5-1 (Wash. Ct. App. February 20, 1997). Respondents' Appendix B. In a case brought in federal court asserting admiralty jurisdiction in a claim brought under FDUPTA, the district court dismissed the action for lack of subject matter jurisdiction. *Sherman v. Royal Caribbean*

Cruises, Ltd., Case No.95-2058-CIV (S.C. Fla. 1995) ("mere fact that the alleged overcharge happens to be for a charge related to a maritime activity does not bring the matter within the ambit of federal admiralty jurisdiction"). Respondents' Appendix 3. Thus, if any "gap" exists, it is one that has been in place for a number of years with no discernable impact on or erosion of federal policy.

For all of the reasons set forth herein, this Court does not have jurisdiction to review the Action at this time and the Petition must be denied.

II. The Decision Below Presents No Question of Exceptional Importance

Rule 10(c) of the Rules of the Supreme Court of the United States provides that in order to obtain review of a state court decision, the court must have either (1) "decided an important question of federal law that has not been, but should be, settled by this Court," or, (2) "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Norwegian's Petition fails to qualify under either criterion.

Norwegian asserts that FDUPTA conflicts with traditional maritime law and therefore must be preempted. Norwegian cites to a small number of cases which have denied application of state deceptive practices statutes in determining the outcome of certain specific civil litigation. Petition at 8-9. However, there was no question in any of those cases that admiralty jurisdiction existed. For example, in *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577 (5th Cir. 1986), the dispute concerned liability for a fire which occurred on board a ship.

As a threshold matter, a court must first determine whether admiralty jurisdiction should apply at all. Norwegian omits this crucial step in asserting that maritime law preempts FDUPTA in this Action. Determinations of admiralty jurisdiction are reached utilizing the test set forth in *Grubart v. Great Lakes Dredge & Dock, Co.*, 513 U.S. 527 (1995). In order to apply admiralty jurisdiction to a tort claim, the party asserting jurisdiction must "satisfy conditions both of location and of connection with maritime activity." *Id.* at 534.

First there must be a determination of "whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." *Id.* In this Action, it is undisputed that Norwegian's deceptive and misleading actions occurred entirely on dry land. On this prong of the test alone, Norwegian's arguments must fail.

Norwegian also fails to meet the requirements of the connection test. The first element of this test requires the court to determine whether the action complained of has a "potentially disruptive impact on maritime commerce." *Id.* at 538. The conduct at issue here is the misleading and deceptive content of marketing and advertising materials Norwegian disseminated to the consuming public. The content of those materials has no disruptive impact on maritime commerce.

The second element of the connection test requires a determination that the activity giving rise to the claim "shows a substantial relationship to traditional maritime activity" *Id.* at 539.The content of marketing and advertising materials does not bear a substantial relationship to traditional maritime activity.

Therefore, under each aspect of the test set forth in *Grubart*, Norwegian fails to establish that admiralty jurisdiction is available. Without such jurisdiction, courts have refused to even reach the preemption question posed by Norwegian. *See, e.g., Certain Underwriters Subscribing to the Institute of London Underwriters Policy No. MB7092 A00 v. Apwel, Inc.*, 1991 WL 86117 (N.D. Ill. 1991).

In addition, even if the absence of admiralty jurisdiction were ignored, Norwegian's Petition must be denied. In *F/V Robins Nest, Inc. v. Atlantic Marine Diesel, Inc.*, 1994 WL 594592 (D.N.J. 1994) the court considered whether maritime law preempts the New Jersey Consumer Fraud Act. In so doing, the *Robins Nest* court reviewed the three-pronged test set forth in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) and reaffirmed in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994). Under this test a state law will not be preempted if it does not: (1) contravene the "essential purpose" of an act of Congress; (2) work material prejudice to the "characteristic features" of maritime law; or (3) interfere with the "proper harmony" of maritime law. *Robins Nest* at *2. *See also, In re Exxon Valdez*, 270 F.3d 1215, 1250-53 (9th Cir. 2001) (admiralty law does not preempt recovery under state law for economic injuries).

The court in *Robins Nest* concluded that the consumer fraud statute was not preempted even though the remedies provided under the statute were not available in admiralty. First, the statute did not contravene an act of Congress. Second, the statute was not a characteristic feature of admiralty because it did not originate in admiralty or have exclusive application there. *Robins Nest* at *3. Finally, the court balanced the state's interest in the law against the federal need for harmony and uniformity in federal law and concluded that the strong interest of the state in protecting consumers outweighed the need for uniformity.

This same conclusion was reached by the Third District in this Action. Thus, the decision by the Florida court does not conflict with any relevant decision of this Court or indeed any Circuit Court of Appeal, or even the highest court of any other state. Furthermore, to the extent that any important federal question is raised in this Action, it has already been settled by the application of the Court's prior decisions on admiralty jurisdiction and the tests required to determine whether or not a state statute, such as FDUPTA, should be preempted, all of which supports denial of the Petition.

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be denied.

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APPENDIX

APPENDIX A — DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 95-2108-CIV-KING
MAGISTRATE JUDGE JOHNSON

ARLEN FISCHLOWITZ and PATRICIA FISCHLOWITZ, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs.

KLOSTER CRUISE LIMITED, a Bermuda corporation, d/b/a NORWEGIAN CRUISE LINE,

Defendants.

Defendant, Kloster Cruise Limited, d/b/a Norwegian Cruise Line, moves this court for an order pursuant to Federal Rule of Civil Procedure 12(b)(1) dismissing this case and in support thereof states:

1. This is a dispute involving Plaintiffs, Arlen Fischlowitz and Patricia Fischlowitz, passengers aboard a vessel owned by Kloster Cruise Limited. In their Amended Complaint, the Plaintiffs request injunctive relief in damages pursuant to Florida Statute 501.201, *Florida Deceptive and Unfair*

Trade Practices Act, for allegedly overcharging them for "port charges." Plaintiffs also claim entitlement to a class action based on the facts in their complaint.

2. Plaintiffs allege that jurisdiction is proper pursuant to 28 USC § 1333. Despite this allegation, there is no jurisdiction pursuant to 28 USC § 1333.

MEMORANDUM OF LAW

In the instant case, the Fischlowitz' allege a violation of a Florida state unfair trade practices statute. Their complaint pivots on claims of misrepresentation of "port charges" — Plaintiffs claim that Defendant advertised a port charge which was substantially lower than the port charge actually charged to the Defendant. Taking the allegations of the complaint as true, this court has no subject matter jurisdiction pursuant to 28 USC § 1333.

The seminal Supreme Court case concerning the reach of federal maritime tort jurisdiction is *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 US 249, 93 S.Ct. 493, 34 L.Ed.2d. 454 (1972). *Executive Jet* established the two-part "locality-plus-nexus" test for maritime tort jurisdiction. According to *Executive Jet*, the tort must have occurred on or over navigable waters, and the wrong alleged must "bear a significant relationship to a traditional maritime activity." Elaborating on the second part of the *Executive Jet* test, the Supreme Court listed four factors relative to a finding of "significant relationship to traditional maritime activity." These factors are (1) the functions and roles of the parties;

(2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and, (4) traditional concepts of the role of admiralty law. Because the Plaintiffs have met neither the locality nor the nexus parts of the *Executive Jet* test, this court may not exercise subject-matter jurisdiction here.

Case law illustrates the parameters of admiralty jurisdiction. In *Gaspard v. Amarata Hess Corp.*, 13 F.3d 165 (5th Cir. 1994), the Fifth Circuit held that a painter's helper injured while trying to board a barge, was not engaged in particularly maritime activity at the time of his injury to support exercise of admiralty jurisdiction because the injury was not meaning-fully different from a slip and fall injury occurring wholly on land. Similarly, in *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984) the Eleventh Circuit found that there was no admiralty jurisdiction in cases where negligent acts and omissions alleged by ship repair workers against manufacturers and distributors of asbestos products were the exposure was land-based. *See Hollister v. Luke Const. Co.*, 517 F.2d 920, 921 (5th Cir. 1975) (nexus requirement was not met where welder was injured while working on a floating, but still incomplete hull, because vessel construction is not a maritime activity.) *See also Lamontagne v. Craig*, 632 F.Supp. 706, 709 (N.D.Cal. 1986) (admiralty jurisdiction does not extend to defamatory liable where, although written at sea, publication and corresponding injury occurred on land), *aff'd.*, 817 F.2d 556 (9th Cir. 1987); *Clinton v. Joshua Hendy Corp.*, 285 F.2d 199, 201-02 (9th Cir. 1960) (admiralty jurisdiction does not extend to tortious interference with contractual relations consummated on land.)

This alleged tort occurred on land and thus, fails the first prong of the *Executive Jet* test — "location" — of admiralty jurisdiction. Even if Plaintiffs fulfilled the "location" prong of the *Executive Jet* test, none of the four criteria relative to a finding of a significant relationship to traditional maritime activity exists here. There is nothing uniquely maritime about a misleading advertisement; it is not meaningfully different from any land-based misrepresentation. Admiralty law has never traditionally concerned itself with protecting the rights of citizens who find advertising to be misleading. The mere fact that the alleged overcharge happens to be for a charge related to a maritime activity does not bring the matter within the ambit of federal admiralty jurisdiction. *See, e.g., E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660, 662 (11th Cir. 1987). In short, this case is not a uniquely maritime case and Plaintiffs cannot fulfill the second part of the *Executive Jet* test — nexus to maritime activity.

Pursuant to Local Rule 3.9(D), Defendant brings to the attention of this court the order of dismissal in the case of *Drs. Alan and Carol Sherman v. Royal Caribbean Cruises, Ltd.*, Case No. 95-02058, United States District Court, Southern District, attached as Exhibit "A" in which the district court dismissed for lack of subject matter jurisdiction plaintiffs' complaint brought under the Florida Deceptive and Unfair Trade Practices Act allege in which plaintiffs allege that defendant Royal Caribbean Cruises overcharged plaintiffs for port charges.

Appendix A

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APPENDIX B — ORDER OF THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE DENYING MOTION FOR DISCRETIONARY REVIEW DATED FEBRUARY 20, 1997

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

No. 39791-5-I

COMMISSIONER'S RULING
DENYING DISCRETIONARY REVIEW

FRANCINE PICKETT, BRIAN COHEN, JACK MASIN, BELLE MASIN, RICHARD TUMPOWSKI, and RUTH TUMPOWSKI, individually and on behalf of all others similarly situated,

Respondent,

v.

HOLLAND AMERICA LINE — WESTOURS, INC.,

Petitioner.

Holland America seeks discretionary review of the superior court order denying Holland America's motion for summary judgment dismissal of the claims of all but one plaintiff. Because Holland America fails to establish that the court's ruling affects the status quo, the motion for discretionary review is denied.

Appendix B

FACTS

Plaintiffs are residents of New York, California and Florida who took Caribbean cruises on Holland America. They have filed suit against Holland America, challenging the amounts it charged for "port charges and taxes." The plaintiffs allege a violation of the Washington Consumer Protection Act, negligent misrepresentation and unjust enrichment.

Each plaintiff-passenger received a contract before taking the cruise. The contracts contain limitation periods: a 30-day period within which to give notice of a claim and a 180-day period of repose. The contracts also contain the following choice of law provision:

> This contract is issued at Seattle, Washington. As to Cruises and as to the Ship segment of your Cruisetour, it will be construed in accordance with the general maritime law of the United States. As to the non-Ship segment of your Cruisetour, it will be construed in accordance with the laws of the State of Washington, U.S.A.

According to Holland America, a cruise involves travel entirely by ship, visiting only ports of call, while a cruisetour includes a land tour as well as a cruise.

Only one plaintiff, Francine Pickett, complied with these contractual limitations. Based on the other plaintiffs' failure to comply with the contractual limitations periods, Holland America moved for summary judgment dismissal.

Appendix B

The parties submitted extensive briefing and presented full argument. The court denied Holland America's motion for summary judgment, ruling:

> The court finds the gravamen of plaintiff[s'] claim is the alleged unfair and deceptive conduct which induced plaintiffs to enter into a contract. The alleged conduct did not concern the cruise or ship segment of the cruisetour and is therefore not governed by maritime law. Rather, the alleged conduct is governed by the law of Washington. Under Washington law, the time limits in the cruise contracts would not be strictly enforceable because the plaintiff must have an opportunity to reasonably discover the elements of his cause of action. The factual record is not sufficiently clear to determine whether plaintiffs knew or reasonably should have known what the port charges and taxes were.

Holland America moved for reconsideration, arguing that federal maritime law would govern enforcement of the contractual limits on the right to sue, even if Washington law would govern the "alleged conduct." The court denied the motion.

Holland America now seeks discretionary review.

Appendix B

CRITERIA

This court will grant interlocutory review of a superior court order only:

> (1) If the superior court has committed an obvious error which would render further proceedings useless; or
>
> (2) If the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; or
>
> (3) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court.

RAP 2.3(b).

DECISION

The trial court reasoned that Washington law applied because the conduct that forms the basis of the lawsuit occurred on land, before the plaintiff-passengers began their cruises. Holland America challenges the court's ruling because the contract states that Washington law applies in only one situation: the non-ship segment of a cruisetour. Because the plaintiffs took cruises, not cruisetours, and Holland America argues the court committed obvious error by refusing to apply federal maritime law.

Appendix B

Holland America further argues that under federal maritime law, the contractual limitations periods are enforceable and therefore the trial court committed obvious error by refusing to enforce them. It cites numerous cases that set forth the maritime law standards for determining whether such limitations are enforceable.

The plaintiffs defend the court's ruling. They argue that their action boils down to a claim of false advertising and that Holland America fails to demonstrate that such a claim is covered by the contract. In addition, they argue that even under federal maritime law, the court properly refused to enforce the contractual limitations period. Like Holland America, they cite numerous cases supporting their arguments.

Given the absence of directly controlling authority, and supporting authority cited by both sides, it is difficult to say the trial court committed obvious or probable error. However, this question need not be definitely resolved because Holland America cannot show that the court's ruling affects the status quo.

Even if the court had granted Holland America's motion for summary judgment, Francine Pickett's case would have survived because she complied with the contractual limitations periods. Given that her case would proceed, the court's refusal to dismiss the other plaintiffs' claims does not affect the status quo. In addition, questions regarding certification of this case as a class action are yet to be determined. If the court decides to certify the class, then

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Pickett's timely filing satisfies the contractual limitations for all other plaintiffs, as demonstrated in *Yollin v. Holland America Cruises, Inc.*, 97 A.2d 720 (1983).

In that case, Yollin filed an action of behalf of himself and 904 other passengers who booked a Caribbean cruise with Holland America. The complaint pleaded several causes of action, including fraud, breach of contract, negligence and false advertising. Only Yollin complied with the contractual limitations for suing Holland America. The lower court held that the other passengers were time-barred and therefore precluded from class membership. The appellate court disagreed, holding that timely commencement by Yollin "satisfied the purpose of the contractual limitation period as to all persons who might subsequently participate in the suit as members of a class." *Yollin*, 97 A.2d at 875.

For all these reasons, Holland America fails to carry its heavy burden that the criteria of RAP 2.3(b) have been satisfied.

Now, therefore, it is hereby

ORDERED that the motion for discretionary review is denied.

Done this 20th day of February, 1997.

s/ Paris K. Kallas
Court Commissioner

APPENDIX C — ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA DATED NOVEMBER 23, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-2058-CIV-UNGARO-BENAGES

DRS. ALAN and CAROL SHERMAN, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs.

ROYAL CARIBBEAN CRUISES, LTD.,

Defendants.

ORDER OF DISMISSAL

THIS CAUSE came before the Court upon Plaintiffs' Motion to Amend Complaint filed October 17, 1995.

THIS COURT has reviewed the file an the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby,

ORDERED and ADJUDGED that Plaintiffs' Motion to Amend is DENIED and this Cause is DISMISSED due to lack of subject matter jurisdiction. Plaintiffs state that jurisdiction is proper pursuant to 28 U.S.C. § 1333. However, this Court finds that jurisdiction is not proper in this Court

because Plaintiffs' cause of action is not a "civil case of admiralty or maritime jurisdiction," and Plaintiffs have not asserted any other grounds for federal jurisdiction.

Federal courts possess jurisdiction over admiralty claims to further the important national interest in establishing a uniform body of maritime law. *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1528 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). As a result, federal courts possess admiralty jurisdiction over claims having a significant relationship to traditional maritime activity. *See Guidry v. Durkin*, 834 F.2d 1465 (9th Cir. 1987). Federal courts tend to exercise admiralty jurisdiction restrictively because its use invokes substantive maritime law which may tend to preempt state regulation of matters traditionally within ambit of local control. *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985), *cert. denied*, 474 U.S. 970. In the case at bar, Plaintiffs' claim is brought under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, alleging that Defendants overcharged them for port charges when selling packages for travel on Defendants' cruise line. The Court finds that the mere fact that the alleged overcharge happens to be for a charge related to a maritime activity does not bring the matter within the ambit of federal admiralty jurisdiction. *See, e.g., E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660, 662 (11th Cir. 1987) ("The mere fact a contract has some reference to a maritime matter . . . is not sufficient to bring it within admiralty jurisdiction.")

Plaintiffs'claim is brought under the Florida Deceptive and Unfair Trade Practices Act and is entirely a matter of state jurisdiction. Accordingly, it is hereby

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ORDERED AND ADJUDGED that Plaintiffs' Amended Complaint is DISMISSED due to lack of subject matter jurisdiction.

DONE AND ORDERED in Chambers at the United States District Courthouse in Miami, Florida, this 23 day of November, 1995.

s/ Ursula Ungaro-Benages
Ursula Ungaro-Benages
UNITED STATES DISTRICT JUDGE